IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL VASSALLO	:	
	:	
v.	:	
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JOHN TIMONEY, Commissioner, Philadelphia Police Department, RICHARD ZAPPILLE, Deputy Commissioner, Philadelphia Police Department, ALOYSIUS MARTIN, Lieutenant, Philadelphia Police Department, JOHN NORRIS, Deputy Commissioner, JAMES DANBACH, Special Deputy U.S. Marshal, JAMES WILLIAMSON, Special Agent, JOHN MCGRATH, Police Officer, Philadelphia Police Department, CYNTHIA O'LEARY, Police Officer, Philadelphia Police Department, THOMAS HYERS, Police Officer, Philadelphia Police Department, DONALD GILLISPIE, Police Officer, Philadelphia Police Department, CITY OF PHILADELPHIA	:	**CIVIL ACTION**
	:	**NO. 00-84**

M E M O R A N D U M

WALDMAN, J. **October 15, 2001**

I. Introduction

This case arises from the termination of plaintiff, a former sergeant in the Philadelphia Police Department ("PPD"), and a subsequent federal criminal prosecution for his alleged deprivation of the civil rights of an arrested man.

Plaintiff commenced this action in the Philadelphia Court of Common Pleas by Writ of Summons. He thereafter filed a complaint asserting federal claims against the City and various

members of the PPD under 42 U.S.C. §§ 1981, 1983 and 1985 for alleged retaliation for speech protected by the First Amendment, and false arrest and malicious prosecution in violation of the Fourth Amendment. Plaintiff asserted similar Bivens claims against an FBI agent and deputy Marshal. Plaintiff also asserted state law claims for false arrest, malicious prosecution, defamation and intentional infliction of emotional distress.

The federal defendants removed the case to this court. By stipulation of March 2, 2001, plaintiff dismissed his claims against the federal defendants and Donald Gillespie, one of the PPD defendants. Plaintiff has also abandoned his § 1981, § 1985 and defamation claims which he states in his brief are "withdrawn."

The remaining defendants are the City of Philadelphia, Police Commissioner John Timoney, former Deputy Commissioner Richard Zappille, Deputy Commissioner John Norris, Lieutenant Aloysius Martin, and Officers John McGrath, Cynthia O'Leary and Thomas Hyers. Presently before the court is the motion of these eight remaining defendants for summary judgement on each of plaintiff's remaining claims.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. Of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to

plaintiff, the pertinent facts are as follows.

Plaintiff joined the Philadelphia Police Department in 1977. In 1987 he was promoted to the rank of Sergeant and was assigned to the 14th District 5 Squad. On April 20, 1993, there was burglary at a retail establishment known as the Leather Connection on Germantown Avenue in Philadelphia. At the scene, two Five Squad officers under plaintiff's supervision apprehended Lawrence Jones on the roof of the store and brought him down to plaintiff. Mr. Jones was turned over to Officers McGrath and O'Leary to be transported to Northwest Detectives. These officers, however, did not transport Mr. Jones that night.

According to plaintiff, in February or March of 1996 Deputy Commissioner Richard Zappille spoke at a community meeting in Chestnut Hill.[1] Prior to the meeting, Mr. Zappille informed plaintiff that he intended to tell those in attendance that the number of Five Squad officers was going to be increased. Mr. Zappille delivered this message. Some time after Mr. Zappille spoke, plaintiff told the audience that the Deputy Commissioner was misinformed and that in fact an increase in Chestnut Hill would not be justified at that time because the police did not have the manpower.[2] After the meeting, the plaintiff was told by

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[1]Mr. Zappille has no recollection of this meeting or any meeting with Mr. Vassallo whatsoever.

[2]Plaintiff does not recall whether Mr. Zappille heard this. Although he believes that Mr. Zappille went to the back of the room, plaintiff does not recall whether the Deputy Commissioner remained at the meeting to listen to the other speakers after completing his own statement or not.

Dick Martin, head of the Chestnut Hill Business Association, that he had made a mistake by contradicting the Deputy Commissioner.

Plaintiff then decided to begin his own private investigation of Mr. Zappille. In early September of 1996, plaintiff became aware of an incident involving a wrongful arrest that reflected poorly on Mr. Zappille.[3] Sometime in September 1996, plaintiff met Mr. Zappille in an elevator in the Police Affairs Building ("PAB"). With only the two of them present, Mr. Zappille said "if you think I forgot what you did to me at that meeting I didn't." Plaintiff replied, "if you think I don't know about the sheet metal workers union, I do."[4]

In early 1997, plaintiff contacted the FBI, implicating Mr. Zappille in the Creighton matter. It is unclear from the record that the FBI did anything in response. It does appear that an IAD investigation of Mr. Zappille for possible harassment ensued upon a complaint by Mr. Creighton. The charge was

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[3]On August 5, 1996, two officers in Mr. Zappille's division arrested Charles Creighton after a confidential informant informed Mr. Zappille that Mr. Creighton was an habitual drunk and was driving with a suspended license. The informant provided two addresses where Mr. Creighton could be found, one of which was located near the sheet metal workers union hall. On Mr. Zappille's orders, the officers were instructed to investigate. Mr. Creighton at the time was running for office in a sheet metal workers union election. Unbeknownst to the arresting officers, the profile of Mr. Creighton provided by the informant was false.

[4]Mr. Zappille denies that there was ever any such exchange or that he ever met plaintiff in the PAB elevator. For purposes of the instant motion, of course, the court assumes that plaintiff's version is correct.

unsustained.[5]

In 1996, plaintiff was involved in several incidents that came to the attention of the Police Department's Internal Affairs Division ("IAD").

In January 1996, Gerald Conney filed a complaint with "IAD" charging physical abuse and false arrest. The investigation concluded on July 21, 1997 with the IAD sustaining the false arrest but not the physical abuse charge.

On September 27, 1996, plaintiff was involved in a physical altercation with Denise Weiler, the sister of plaintiff's girlfriend, Theresa Urbanski. Ms. Weiler gave a statement to Sergeant Thomas Hyers of IAD, who investigated the matter through February of 1997. Ms. Weiler, however, never filed a formal complaint.

On October 10, 1996, plaintiff was involved in an off-duty altercation with Thomas Cooney, a retired Police Inspector. IAD learned of the altercation and interviewed Mr. Cooney on October 29, 1996. Mr. Cooney filed a criminal complaint for assault, alleging that plaintiff ran him off the road and then physically assaulted him. Mr. Vassallo filed a cross-complaint against Mr. Cooney. Both complaints were subsequently dropped.

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[5]Mr. Zappille is no longer a member of the PPD. In April 1998, he resigned when he was appointed Deputy Mayor. Since 1999, he has held the position of Chief of the Philadelphia Housing Police.

On October 25, 1996, plaintiff was detained by security officers inside a Rite Aid store who observed plaintiff attempting to steal boxes of medication. After plaintiff was released, he returned with three bottles of liquor and a note stating "I apologize for my stupidity." Christopher Milton, the Rite Aid security manager, reported the shoplifting incident to the police. Plaintiff was charged with the summary offense of retail theft on November 15, 1996. On November 19, 1996, he received a letter from the Philadelphia Service Institute offering alternative disposition by which he would pay a fine and attend a three hour class and the charge would be dismissed and expunged. After completing the course on December 7, 1996, however, plaintiff was advised that the District Attorney's Office had declined alternative disposition. The action proceeded to trial. Sergeant Hyers began an IAD investigation of the Rite Aid incident in November 1996.[6]

On November 15, 1996, plaintiff was suspended from the PPD with intent to dismiss. The notice, signed by former Commissioner Neal, stated the grounds for suspension in pertinent part as follows:

[6]The parties submitted matters reflecting their respective version of the events surrounding a charge against plaintiff in 1988 for retail theft at a Clover store. There is no suggestion, however, that this played any role in or is at all relevant to the actions underlying the claims in this action.

> CONDUCT UNBECOMING AN OFFICER, Section 1.75: On October 25, 1996, at approximately 5:30pm, you were in the Rite Aid store located at 11747 Bustleton Avenue. While in the Rite Aid, store employee Gregory Young observed you pick up four packages of over the counter medications. A follow up investigation into the above incident resulted in your being positively identified, via photo spread, by two witnesses. As a result of this incident, you were charged with Retail Theft.

On December 12, 1996, the Commissioner issued a Notice of Dismissal to plaintiff on these grounds. While each case is individually considered, police officers are routinely discharged upon the filing of a criminal charge.

The Fraternal Order of Police filed a grievance on November 20, 1996 seeking Mr. Vassallo's reinstatement. While the Rite Aid matter is on appeal, the arbitration has been held in abeyance.

On April 22, 1997, plaintiff was convicted of retail theft in the Philadelphia Municipal Court. That decision was appealed to the Court of Common Pleas and after a de novo trial plaintiff was again convicted of retail theft. Plaintiff appealed this conviction to the Superior Court where for the first time he raised as a defense a claim that he never should have gone to trial due to his completion of the alternative resolution program. The Superior Court vacated the conviction and remanded the case back to the Court of Common Pleas. On remand, the Court of Common Pleas determined that the defendant had waived any right to raise the ARD defense and reinstated the

conviction. Mr. Vassallo has appealed this decision to the Superior Court.

Lieutenant Aloysius Martin, assigned to IAD, received a "white paper" in March 1997 from his superior, Captain Edward Stinson, containing allegations arising from Thomas Cooney's assault complaint. An investigation followed. Officer Martin spoke with Dennis Donlon, an officer who worked in Five Squad. Officer Donlon informed Lieutenant Martin that plaintiff had beaten a prisoner in the rear of a wagon. After speaking with other officers in the 14th District and reviewing plaintiff's arrest records, Mr. Martin was led to the April 1993 arrest of Lawrence Jones at the Leather Connection. Between March 31 and April 3, 1997, Mr. Martin interviewed John McGrath and Cynthia O'Leary, two officers at the scene, as well as Lawrence Jones.

Mr. Jones related that he had been beaten in the van by an officer without cause. Officers McGrath and O'Leary stated that they were assigned to the emergency patrol wagon during the Jones arrest. When they arrived on the scene, Mr. Jones was already in handcuffs. They escorted the prisoner to the patrol wagon and were instructed to take Mr. Jones to the North Detective Division. Plaintiff then entered the wagon and closed the door behind him. Officers O'Leary and McGrath then heard banging in the wagon. When plaintiff exited the wagon shortly thereafter, the prisoner was bleeding. The officers were

instructed to take him to the hospital. They then spoke with their immediate supervisor, Sergeant Gatter, who informed them that "it’s ok, you don’t have to take the prisoner, we’ll take care of it."

In the Spring of 1997, Kelly Tooher (now deceased), a former girlfriend of plaintiff, contacted officer Thomas Hyers at IAD. She complained that she was physically abused and threatened by plaintiff and was afraid of him. Officers Hyers explained the procedures for obtaining a Protection from Abuse Order and drove her to family court. He also conducted a preliminary investigation into an abuse complaint made against plaintiff by Denise Weiler. Both Ms. Tooher and Ms. Urbanski obtained temporary Protection from Abuse ("PFA") Orders against plaintiff. Ms. Tooher reported that plaintiff was stalking and harassing her and Ms. Urbanski stated that he had threatened her life and the life of her daughter. Both Ms. Tooher and Ms. Urbanski dropped the PFA Orders after plaintiff signed a statement promising to stay away from them.

On June 17, 1997, George Craig, Deputy Commissioner for IAD, directed that the internal investigations of plaintiff should be concluded and the matter turned over to the FBI. In late June of 1997, Messrs. Hyers and Martin contacted James Danbach and Special Agent James Williamson and the FBI took over the investigation. Pursuant to a consent order, IAD has been

required since 1996 to pursue investigations, once undertaken, even if the subject officer was separated from the PPD.

On October 21, 1997, a federal grand jury indicted plaintiff for deprivation of the civil rights of Lawrence Jones in violation of 18 U.S.C. § 242. Officers McGrath and O'Leary and other members of the Five Squad were called to testify. The grand jury also indicted Sergeant Gatter and Officer Lamont Fox, who testified favorably for plaintiff, for perjury before the grand jury. In February of 1998, Mr. Vassallo was found not guilty of violating the civil rights of Mr. Jones.

IV. Discussion

Two of plaintiff's four remaining federal claims, the § 1983 false arrest and malicious prosecution claims, are predicated on an alleged violation of plaintiff's Fourth Amendment rights. The third claim is for retaliatory prosecution and is predicated on an alleged violation of plaintiff's First Amendment rights. The fourth remaining federal claim is against the City on a Monell theory for failure to reinstate plaintiff. Plaintiff is also pursuing state law claims for malicious prosecution, false arrest and intentional infliction of emotional distress.

A. Statute of Limitations

The Pennsylvania two year statute of limitations for personal injury claims is applied to § 1983 claims. See Reitz v.

County of Bucks, 125 F.3d 139, 143 (3d Cir. 1997). The two year statute of limitations also applies to claims for false arrest, malicious prosecution and intentional infliction of emotional distress claims. See 42 U.S.C. § 5524.

The statute of limitations begins to run at the time the cause of action accrues. See Oshiver v. Levin, Fishbein, Sedran, and Berman, 38 F.3d 1380, 1386 (3d. Cir. 1994). The present action was commenced by writ of summons on October 20, 1999, followed by a subsequent complaint. Any claim which accrued prior to October 20, 1997 would thus be time barred. Although state law defines the applicable statute of limitations, federal law determines when the cause of action accrues. See Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1127 (3d Cir. 1988); Deary v. Three Un-named Police Officers, 746 F.2d 185, 197 n.16 (3d Cir. 1984).

A § 1983 claim accrues when the plaintiff "knew or had reason to know of the injury that constitutes the basis of [the] action." Montgomery v. De Simone, 159 F.3d 120, 126 (3d Cir. 1998) (quoting Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991)). A "claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong." Oshiver, 38 F.3d at 1386.

Plaintiff was convicted of retail theft and discharged prior to October 20, 1997. Plaintiff, however, confirms in his

brief that he is not pursuing any claim for injuries resulting from the Rite Aid conviction or termination per se. Plaintiff was charged in the Jones case on October 21, 1997. Claims of injuries resulting from this charge and subsequent events are thus within the limitations period.

B. First Amendment

Plaintiff asserts that in retaliation for his questioning Deputy Commissioner Zappille's comment on manpower at the meeting in Chestnut Hill in February or March of 1996 and his implicating Mr. Zappille to the FBI in the Creighton matter in early 1997, plaintiff was prosecuted in the Jones case.

To sustain a First Amendment retaliation claim, a plaintiff must show that the speech in question was protected and that it was a substantial or motivating factor in the alleged retaliatory action. A defendant may still defeat such a claim by showing that the same action would have been taken even in the absence of the protected activity. See Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995).

Determining whether a public employee's speech involves a matter of public concern is a question of law for the court. See Connick v. Myers, 461 U.S. 138, 148 n.7 (1983); Versage v. Township of Clinton, N.J., 984 F.2d 1359, 1364 (3d Cir. 1993). In the public employment context, speech is protected when it appears from an examination of the content, form and context that

it relates to a matter of public concern and the speaker's interest in such speech is not outweighed by the government's interest in effective and efficient operation. Connick, 461 U.S. at 146-48; Swineford v. Snyder County Pa., 15 F.3d 1258, 1271 (3d Cir. 1994). See also Azzaro v. County of Allegheny, 110 F.3d 968, 975 (3d Cir. 1997); Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1995).

Speech disclosing wrongdoing by public officers or criticizing their official actions and decisions is protected. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979) (complaints about school board policies and practices); Pickering v. Board of Educ., 391 U.S. 563, 566 (1968) (letter to editor criticizing school board's allocation of funds); Swineford, 15 F.3d at 1271-72 (allegations of malfeasance by public officials); Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983) (speech regarding whether county officials were properly performing their governmental responsibilities is speech "fall[ing] squarely within the core public speech delineated in Connick"). See also O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989) (exposing breaches of the public trust is a matter of public concern).

A comment at a community meeting about the best use of limited police manpower involves a matter of public concern. A report to an appropriate authority, at least if made in good

faith, that a police official had engaged in improper conduct in the exercise of his duties involves a matter of public concern.

Defendants correctly note that a police department has a particular interest in maintaining discipline and harmony. See Cochran v. City of Los Angeles, 222 F.3d 1195, 1199 (9th Cir. 2000). Defendants also correctly note that potential, as well as actual, disruption from expressive conduct to the effective operation of government is properly considered. Authorities, however, may not simply presume disruption is likely to occur but must support a prediction of disruption with "specific evidence." Barker v. City of Del City, 215 F.3d 1134, 1140 (10th Cir. 2000). Moreover, discontent or disruption over the subject matter to which the speech pertains does not render that speech itself disruptive. See Watters, 55 F.3d at 897. Defendants have not shown that the plaintiff's interest in speaking was outweighed by a need to maintain the effective and efficient operation of the PPD.

One cannot reasonably find from the competent evidence of record, however, a causal link between plaintiff's comment about deployment of police manpower in Chestnut Hill or his statement to the FBI about the Creighton matter and his federal indictment in the fall of 1997. There is no competent evidence of record that Mr. Zappille or any other defendant was aware in the fall of 1997 of any statement by plaintiff to the FBI about the Creighton matter. There is no competent evidence of record

that the Deputy Commissioner for IAD, any IAD officer who investigated the Jones case, anyone involved in the decision to refer the matter to federal authorities or who testified before the federal grand jury were aware of plaintiff's comment a year and a half earlier in Chestnut Hill, or were in any way influenced by Mr. Zappille. There is no competent evidence of record contradicting Mr. Zappille's testimony that he was not even aware an IAD investigation had been commenced.

C. False Arrest and Malicious Prosecution

To sustain a § 1983 malicious prosecution claim under the Fourth Amendment, there must be a seizure or deprivation of liberty effected pursuant to legal process. See Albright v. Oliver, 510 U.S. 266, 274-75 (1994); Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (3d Cir. 1995). Plaintiff's obligation to go to court and answer the charges against him constitute a sufficient restraint of liberty or "seizure" to satisfy this requirement. See Gallo v. City of Phila., 161 F.3d 217, 224-25 (3d Cir. 1998).

A seizure does not violate the Fourth Amendment, however, unless it is unreasonable. See Brower v. County of Inyo, 489 U.S. 593, 599 (1989) ("'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable'"). The restraint on plaintiff's liberty was of a type which ordinarily accompanies criminal prosecution and is not unreasonable if the

prosecution was initiated with probable cause.[7]

An arrestee may assert a § 1983 false arrest claim based on an arrest made without probable cause. See Groman v. Township of Manalapan, 47 F.3d 628, 636 (3d cir. 1995). Damages for false arrest cover only the time of detention to the issuance of process or arraignment. See Heck v. Humphrey, 512 U.S. 477, 484 (1994). Where probable cause existed to charge a plaintiff, he cannot sustain a § 1983 claim for false arrest. See Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). See also Groman, 47 F.3d at 636.[8]

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[7]At the time of Albright, the Third Circuit had the "most expansive approach" to malicious prsecution claims under § 1983, requiring only proof of the elements of the common law tort. Albright, 510 U.S. at 270 n.4. Other circuits required a showing of egregious misconduct resulting in a constitutional deprivation. Id. The Third Circuit has now noted that Albright at least "casts doubt" on prior precedent adopting the elements of the common law tort for § 1983 claims and has suggested that rather one must look to the text of the constitutional provision on which the claimed right is predicated. See Merkle v. Upper Dublin School Dist., 211 F.3d 782, 792 (3d Cir. 2000). Under Third Circuit precedent, the presence of probable cause is fatal to a § 1983 malicious prosecution claim. See Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996); Lee v. Mihalich, 847 F.2d 66, 70 (3d Cir. 1988). Under a Fourth Amendment analysis, a brief detention for booking or bail procedures and the need to appear for arraignment and trial do not constitute an "unreasonable" restraint or "seizure" when they are incident to a criminal proceeding initiated with probable cause.

[8]When a prosecutor elects to proceed, a police officer may be liable for malicious prosecution only if he knowingly or with reckless disregard for the truth concealed exculpatory evidence from or provided false or misleading reports to the prosecutor or otherwise interfered with the prosecutor's ability to exercise independent judgment. See Sanders v. English, 950 F.2d 1152, 1162-64 (5th Cir. 1992); Barlow v. Ground, 943 F.2d 1132, 1136-37 (9th Cir. 1991), cert. denied, 505 U.S. 1206 (1992); Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990); Kim v. Gant, 1997 WL 535138, *4-5 (E.D. Pa. Aug. 15, 1997).

Probable cause exists where the totality of facts and circumstances are sufficient to warrant an ordinary prudent officer to believe that the party charged has committed an offense. See Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997); Pansy v. Preate, 870 F. Supp. 612, 618 (M.D. Pa. 1994), aff'd, 61 F.3d 896 (3d Cir. 1995). Where one cannot reasonably conclude from the evidence taken in a light most favorable to the plaintiff that probable cause was lacking, the court may decide the issue as a matter of law. See Merkle, 211 F.3d at 788-89; Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997).

Whether an arrest has been effected with probable cause is determined by an objective test based on "the facts available to the officers at the moment of arrest." Beck v. Ohio, 379 U.S. 89, 96 (1964); Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir. 1994). Probable cause does not require the police to have evidence sufficient to establish guilt beyond a reasonable doubt. Id.; United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984). "The validity of the arrest does not depend on whether the suspect actually committed the crime" and his "later acquitt[al] of the offense for which he is arrested is irrelevant to the validity of the arrest." Michigan v. DeFillippo, 443 U.S. 31, 36 (1979). See also Groman, 47 F.3d at 634. An officer who has probable cause to arrest is not required to conduct further investigation for exculpatory evidence or to pursue the

possibility that the suspected offender is innocent. See Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th Cir.), cert. denied, 519 U.S. 867 (1996); Simkunas v. Tardi, 930 F.2d 1287, 1292 (7th Cir. 1991); Marx v. Gumbinner, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990); Kompare v. Stein, 801 F.2d 883, 890 (7th Cir. 1986).

To sustain a false arrest claim under Pennsylvania law, a plaintiff must show that he was arrested or detained without probable cause. See Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). To sustain a state law claim for malicious prosecution, a plaintiff must show the initiation by the defendant of criminal proceedings without probable cause and with malice or for a purpose other than bringing the plaintiff to justice, and termination of the proceedings in favor of the plaintiff. See Merkle, 211 F.3d at 791.

The statements of Mr. Jones, Officer McGrath and Officer O'Leary provided ample probable cause to charge plaintiff. The decision to indict and prosecute plaintiff was made and executed by federal authorities. Plaintiff's speculation notwithstanding, there is no competent evidence of record that IAD officers knowingly misled the federal authorities.

D. Monell Claim against the City

There is no respondeat superior liability under § 1983. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295 (3d Cir.

1997). A municipality is liable for a constitutional tort only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" complained of. Id. (quoting Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978)).

"Policy" is made when a decision-maker with final authority to establish municipal policy with respect to the action in question issues an official proclamation, policy or edict. A "custom" is a course of conduct which, although not formally authorized by law, reflects practices of state officials that are so permanent and well settled as to virtually constitute law. A decision by an official with final discretionary decision-making authority over the subject matter can constitute a "policy." See Pembauer v. City of Cincinnati, 475 U.S. 469, 480 (1986); Kennan v. City of Philadelphia, 983 F.2d 459, 468 (3d Cir. 1992); Omnipoint Communications, Inc. v. Penn Forest Twp., 1999 WL 181954, *10 n.4 (M.D. Pa. Mar. 31, 1999); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F.2d 319, 341 (E.D. Pa. 1994).

As a preliminary matter, it is incumbent upon a plaintiff to show that a final policymaker is responsible for the policy or custom at issue. See Pembaur, 475 U.S. at 481-82; Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir.

1990). Whether an official is a final policymaker in a particular area or on a particular issue depends upon the definition of his functions under pertinent state law. See McMillian v. Monroe County, 520 U.S. 781, 785 (1997); Garrison v. Burke, 165 F.3d 565, 572 (7th Cir. 1999); Myers v. County of Orange, 157 F.3d 66, 76 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999); Garrett v. Kutztown Area School Dist., 1998 WL 513001, *4 (E.D. Pa. Aug. 11, 1998). A municipal official is not a final policymaker if his decisions are subject to review and revision. See Morro v. City of Birmingham, 117 F.3d 508, 510 (11th Cir. 1997), cert. denied, 118 S. Ct. 1299 (1998). Police Commissioner Timoney is the pertinent official policymaker. See Keenan v. City of Philadelphia, 983 F.2d 459, 468 (3d Cir. 1992); Andrews, 895 F.2d at 1480.

Plaintiff predicates his Monell claim on an alleged "policy, practice and custom to prevent by any means the reinstatement of Michael Vassallo to the police force." Plaintiff points to the "pursuit of the retail theft conviction after dismissal of the charge" and "pursuit of the IAD complaints after employment termination."

The retail theft charge was not in fact dismissed. The case is pending on appeal before the Superior Court. Moreover, in determining for employment purposes whether an officer has committed a crime or otherwise engaged in conduct unbecoming an

officer, the City need not act only upon proof beyond a reasonable doubt as required to sustain a criminal charge. The testimony of John Norris, currently head of IAD, that once undertaken, IAD investigations proceed even if the subject is separated from the PPD in the interim is uncontroverted.

More basically, plaintiff has not identified any constitutional violation which has resulted from the refusal of the Commissioner to reinstate him unless and until an arbitrator determines that he is entitled to reinstatement. Plaintiff has shown no right to reinstatement at this time, let alone one protected by the Constitution.

E. Intentional Infliction of Emotional Distress

To sustain a claim for intentional infliction of emotional distress, a plaintiff must show intentional or reckless conduct by a defendant which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998). Plaintiff has not presented evidence from which one remotely could conclude that any defendant engaged in such conduct. See, e.g., Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989) (reversing verdict for plaintiff who was defamed, falsely referred for prosecution and deprived of First Amendment rights); Cox v. Keystone Carbon Co., 861 F.2d 390, 395

(3d Cir. 1988) (holding ill-motivated or callous termination of employment insufficient); Motheral v. Burkhart, 583 A.2d 1180, 1190 (Pa. Super. 1990) (falsely accusing plaintiff of child molestation not sufficient).

V. Conclusion

A plaintiff cannot sustain a claim with speculation, conjecture of unsupported assertions in a brief. If plaintiff has a claim, he has failed to produce competent evidence to sustain it. The remaining defendants are entitled to summary judgment on the record presented. Defendants' motion will be granted. An appropriate order will be entered.

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	:	**NO. 00-84**

O R D E R

AND NOW, this day of October, 2001, upon consideration of defendants' Motion for Summary Judgment and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendants.

BY THE COURT:

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JAY C. WALDMAN, J.